STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2005
v	No. 254211 Oakland Circuit Court
WILLIE CROWE MOORE, Defendant-Appellant.	LC No. 2003-191352-FC

Before: Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of armed robbery, MCL 750.529, carrying a concealed weapon (CCW), MCL 750.227, assault with intent to rob, MCL 750.89, third-degree fleeing and eluding, MCL 750.479a(3)(a), and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was also convicted following a short bench trial of an additional count of felony-firearm and one count of being a felon in possession of a firearm (felon in possession), MCL 750.224f. We affirm.

This case arose when defendant pulled a stolen red Jeep Cherokee up to four individuals who were about to enter their car. Accompanying defendant were his friend named Rufus, who never left the Cherokee's back seat, and another man referred to only as "D." The victims testified that defendant emerged from the driver's side of the Cherokee holding a large .357 caliber handgun, and D approached them from the passenger side with a much smaller handgun. Defendant and D pointed their weapons at two of the victims and demanded their valuables. After receiving some cash and a purse, defendant waved his weapon at the victims and demanded more. He and D eventually climbed back into the Cherokee and defendant drove them away. One of the victims memorized the license plate number, and the group fortunately happened upon a police car in a nearby alley. They were able to relay the information within moments of the robbery, and police spotted the Cherokee within moments after the vehicle's description was broadcast. During a subsequent police pursuit, the Cherokee struck an Oak Park

[1] The jury found defendant not guilty on four additional charges regarding the intentional ramming of two occupied police vehicles.

police car and then a Ferndale police car before coming to a stop. Defendant was eventually arrested after fleeing the scene, and two handguns, a .357 and a starter's pistol, were recovered.

Defendant relied on the defense of duress. He testified that the victims were mistaken about who held what firearm. Defendant testified that D had the .357 handgun, and that he used it to compel defendant's participation in the robbery with the starter's pistol. He testified that he was only driving Rufus's Cherokee because Rufus had asked him to drive, claiming that his kidney problems prevented him from driving himself. The jury was not persuaded and returned a verdict of guilty on all of the charges that were directly related to the robbery and for fleeing and eluding.

Defendant's sole argument on appeal is that it was reversible error for the jury to hear an insinuation from the prosecutor that the Cherokee was stolen without first introducing evidence that it was stolen. We disagree. Because defendant failed to object to this insinuation, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant took the stand in his own defense and stated that Rufus came over to his house that night in "his truck." Defendant went on to describe how Rufus then asked defendant to drive the Cherokee and how Rufus directed him as they went.

During cross-examination of defendant, the prosecutor engaged defendant in the following exchange:

> *Q*. Had you ever seen that vehicle before?
>
> *A*. No.
>
> *Q*. Did you know that vehicle was stolen?
>
> *A*. No.
>
> *Q*. Did you think that maybe after you were arrested that's why he wanted you to drive this vehicle, because it was a stolen car?
>
> *A*. No, sir.

Defendant did not object, and nothing more was mentioned about the status of the vehicle until the defense called Rufus as a witness. Rufus denied even knowing defendant and claimed that he merely asked a stranger for a ride that night. He claimed that he saw defendant and D pulling out of the parking lot of a fast-food restaurant and offered to pay them twenty dollars for a ride home. Rufus testified that he must have unwittingly joined defendant and D right after the robbery and before the police chase. During this questionable testimony, defense counsel asked Rufus if he stole the Cherokee and Rufus denied it.

Defendant's counsel again raised the issue in his closing arguments, conceding outright that the Cherokee was stolen. The prosecutor picked up on the concession and emphasized it in his rebuttal arguments. While we are not persuaded that defendant "opened the door" to this evidence merely by testifying that Rufus arrived at his house in "his truck," defendant's concession forecloses any meaningful review of the issue. Defendant could have objected so

that the relevant factual issue could be proved or disproved. He also could have ignored the two questions, anticipating that the jury would find it a minor matter and irrelevant given Rufus's possession of the vehicle and the defense of duress. He could have remained mum and counted on the issue as an appellate parachute,[2] hoping that we would find it such a major matter that objecting was unnecessary. Instead, defendant openly confirmed the prosecutor's insinuation, solidifying it as a fact in the minds of the jurors. Because defendant contributed significantly to any prejudice caused by the prosecutor's brief unchallenged error, this issue does not warrant reversal. *People v Griffin*, 235 Mich App 27, 45-46; 597 NW2d 176 (1999).

Alternatively, defendant argues that he was denied his right to effective assistance of counsel with respect to the handling of the above issue. We disagree. To prevail on a claim of ineffective assistance of counsel "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Because defendant did not raise the issue in the trial court or seek a *Ginther*[3] hearing, we limit our review of defendant's claims to mistakes apparent on the record. *Riley*, *supra* at 140. Defendant never settled on the record whether the vehicle was stolen, so the only evidence available to us is the parties' stipulation that it was. Given this fact, defense counsel probably realized that the prosecutor had proof that the vehicle was stolen and that raising an objection to the question would amount to a demand that the prosecutor present it. MRE 104(b). The evidence was admissible for demonstrating preparation for the armed robbery, MRE 404(b), so rather than challenge the evidence, defense counsel strategically turned the tables on the prosecutor and placed the blame for the stolen vehicle on Rufus. Defendant had already testified that Rufus possessed the vehicle and brought it to his house on the night of the robbery. The fact that the vehicle was stolen painted Rufus as a cold and calculating individual who planned the robbery and manipulated defendant into doing his bidding. This, in turn, lent a shred of potential credence to defendant's anemic duress claim. Because defense counsel's lack of objection and eventual concession about the stolen vehicle did more good than harm to defendant's doomed defense, defendant has failed to overcome the presumption that his attorney's actions were not trial strategy.

Affirmed.

/s/ Karen Fort Hood
/s/ Helene N. White
/s/ Peter D. O'Connell

[2] We do not count this option as proper or effective, we merely present it as an alternative to defense counsel's chosen plan of action.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).